

NOT FOR PUBLICATION - FOR UPLOAD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

Focus Consulting Group, Inc.,	)	
	)	
Plaintiff,	)	Civ. No. 2003-127
	)	
v.	)	
	)	
Merchants Market, Inc., Selective	)	
Construction Management, Inc., M&D	)	
Industries, Terry Coulier, Lou	)	
Elias, Isabel Amengual, David	)	
Reniahan, and Ken Lenois,	)	
	)	
Defendants.	)	
	)	
	)	

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**ATTORNEYS:**

**Stephen A. Brusch**  
St. Thomas, U.S.V.I.,  
*For the plaintiff*

**Sandra Nabozny-Younger**  
St. Thomas, U.S.V.I.,  
*For defendant Merchants Market and Lou Elias,*

**Henry C. Smock**  
St. Thomas, U.S.V.I.,  
*For defendant Ken Lenois*

**MEMORANDUM**

Moore, J.

This matter is before the court on a motion to dismiss Count III (fraud and misrepresentation) for failure to state a claim upon which relief can be granted, filed by defendants Merchant Market and Lou Elias. I agree with the defendants' argument that

the plaintiff's allegation of fraud does not meet the heightened pleading requirement of Rule 9(b) of the Federal Rules of Civil Procedure, and I will grant the motion to dismiss.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Focus Consulting Group, Inc. ["Focus"] entered into a contract with Merchants Market, Inc. ["Merchant"] to provide concrete for a warehouse that Merchant was building near Smith Bay, St. Thomas. A dispute arose between the parties in the course of the construction project and Focus filed suit in Territorial Court, eventually alleging in an amended complaint breach of contract, breach of covenants of good faith and fair dealing, racial discrimination, fraud, and misrepresentation. Defendants Merchant and Lenois timely removed the action to this court based on the plaintiff's racial discrimination claims under federal law. Count III of the plaintiff's amended complaint alleges fraud and misrepresentation, but provides almost no details regarding the alleged fraudulent acts and material misrepresentations.<sup>1</sup>

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<sup>1</sup> Count III of the plaintiff's amended complaint is stated as follows:

38. Plaintiff repeats and realleges paragraphs 1 through 37 of this Complaint as if more fully set forth herein.
39. On or about October 4, 2002, and again on or about October 25, 2002, Defendants, intentionally and willfully, fraudulently, and falsely misrepresented to Plaintiffs that Plaintiffs would

On July 22, 2003, defendants Merchant and Lenois filed notice of a motion to dismiss Count III of the plaintiff's amended complaint for lack of specificity as required Rule 9(b) of the Federal Rules of Civil Procedure. The plaintiff responded by concurrently filing a response to the motion to dismiss and a motion to amend its complaint.<sup>2</sup> The plaintiff's proposed second amended complaint contained no new facts or specific details regarding the alleged fraudulent conduct, but instead only added more vague allegations. Count III of the plaintiff's proposed second amended complaint reads as follows:

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continue to provide all general labor associated with the building of the warehouse, including but not limited to the erection of the steel structure of the warehouse.

40. Plaintiff relied on Defendants agreement and misrepresentations to Plaintiff's detriment.
41. Defendants acts, conduct, and omissions constituted fraud and misrepresentation causing Plaintiff to suffer damages, and Plaintiff is entitled to an award of compensatory and punitive damages in a sum to be determined by a jury.

Although paragraph 38 of the plaintiff's amended complaint incorporates the previous 37 paragraphs, none of the prior statements specify what fraudulent activity allegedly occurred on October 4, 2002, and October 25, 2002. Paragraph 22, the only other paragraph in the complaint to provide substantive information on those dates, simply states "on or about October 4, 2002, and again on October 25, 2002, Focus and Merchants agreed that Focus would continue to provide all general labor associated with the buildings of the warehouse, including but not limited to the erection of the steel structure of the warehouse."

<sup>2</sup> The plaintiff did not respond to this motion to dismiss within the time allowed by Local Rule of Civil Procedure 56.1. The plaintiff, however, subsequently filed a motion to enlarge the time for filing an opposition to the motion to dismiss, which the magistrate judge granted on November 19, 2003.

38. Plaintiff repeats and realleges paragraphs 1 through 37 of this Complaint as if more fully set forth herein.
39. On or about October 4, 2002, and again on or about October 25, 2002, Defendants, intentionally and willfully, fraudulently, and falsely misrepresented to Plaintiffs that Plaintiffs would continue to provide all general labor associated with the building of the warehouse, including but not limited to the erection of the steel structure of the warehouse knowing that it intended to divert the work to Selective and others.
40. Defendants knew that the misrepresentations were false.
41. Plaintiff believed the misrepresentations of Defendants inasmuch as Plaintiffs proceeded to commence work under the contract.
42. Defendants intended for Plaintiffs to act on the misrepresentations inasmuch as at the time of the execution of the contract, an initial payment was tendered to Plaintiff.
43. Plaintiffs relied on the misrepresentations of the Defendants which resulted in the execution of the instant contract, to all its detriment.
44. The acts, conduct, and omissions of the Defendants constituted fraud and misrepresentation causing Plaintiff to suffer damages, and Plaintiff is entitled to an award of compensatory and punitive damages in a sum to be determined by a jury.

In response to the plaintiff's combined opposition to the motion to dismiss and motion to amend the complaint, defendants Merchant and Elias filed a document titled "Response to Plaintiff's Motion to Amend Complaint," which I will assume was also intended to serve as a reply to the plaintiff's opposition to the motion to dismiss. In this document, the defendants argue that Count III

does not satisfy Rule 9(b)'s heightened pleading requirements because it fails to identify who made the alleged false statements, to whom the statements were made, and why the purported false representation of fact was material.

## **II. ANALYSIS**

In considering the defendants' motion to dismiss under Rule 12(b)(6), I "may dismiss [the] complaint if it appears certain the plaintiff cannot prove any set of facts in support of its claims which would entitle it to relief." See *Bostic v. AT&T of the Virgin Islands*, 166 F. Supp. 2d 350, 354 (D.V.I. 2001) (internal quotations omitted); see also *Julien v. Committee of Bar Examiners*, 34 V.I. 281, 286, 923 F. Supp. 707, 713 (D.V.I. 1996); Fed. R. Civ. P. 12(b)(6). The Court accepts as true all well-pled factual allegations, drawing all reasonable inferences in the plaintiff's favor. See *Bostic*, 166 F. Supp. 2d at 354; *Julien*, 34 V.I. at 286-87, 923 F. Supp. at 713.

Even drawing all inferences in favor of the plaintiff, however, Count III of the proposed second amended complaint fails to satisfy the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) states in relevant part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with

particularity." Years ago, this court explained that

[t]he reference to "circumstances" is to matters such as time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. . . . [N]aked assertions of "false" and "misleading" "acts" -- however egregious their impact is said to be -- do not comport with the requirements of Rule 9(b).

*Tradewinds Inc. v. Citibank, N.A.*, 20 V.I. 152, 160 (D.V.I. 1983)(internal quotations and citations omitted). Although the Court of Appeals for the Third Circuit has cautioned against being too stringent in requiring particularity,<sup>3</sup> the plaintiff's complaint fails to satisfy even the most generous interpretation of Rule 9(b). Neither the amended complaint nor the proposed second amended complaint state who made the alleged fraudulent statements, and instead both complaints simply refer to "Defendants," without specifying which of the eight named defendants made what statement. Furthermore, the plaintiff gives the defendants no information about the context in which the statements were made, other than the plaintiff's reference to the date of an agreement between Merchant and Focus regarding who

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<sup>3</sup> The Court of Appeals for the Third Circuit has cautioned that "focusing exclusively on its 'particularity' language 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'" *Christidis v. First Pennsylvania Mortgage Trust*, 717 F.2d 96, 100 (3d Cir. 1983) (quoting 5C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1298 at 407 (1969)). Despite these words of warning, the Court of Appeals went on to hold that the allegations at issue did not meet the requirement of Rule 9(b). As in the present case, the complaint in *Christidis* was vague and gave the defendant inadequate notice of the alleged fraudulent acts.

would supply the labor to construct the warehouse. The plaintiff provides no other details to put the defendants on notice to whom the statements were made, where the statements were made, or what specific fraudulent statements or material misrepresentations were made. The plaintiff has provided so few details of "matters such as time, place and contents of the false representations" that the proposed second amended complaint fails to comply with Rule 9(b).

Normally a vague or incomplete allegation of fraud and misrepresentation can be remedied by an amendment to the complaint. I will grant the defendant's motion to dismiss Count III, however, because the plaintiff has already attempted and utterly failed to rectify the vagueness of its amended complaint, as Count III of its proposed second amended complaint is as vague as the previous one. I accordingly conclude that the plaintiff is unable to satisfy the heightened pleading requirement of Rule 9(b) and will dismiss Count III. An appropriate order follows.

**ENTERED this 15th day of December, 2003.**

**For the Court**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**

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**District Judge**

**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

**By: \_\_\_\_\_/s/\_\_\_\_\_**  
**Deputy Clerk**

**Copies to:**  
Hon. G. W. Barnard  
Stephen A. Bruschi, Esq.  
Sandra Nabozny-Younger, Esq.  
Henry C. Smock, Esq.  
Mrs. Jackson  
Jeffrey Corey, Esq.



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**Henry C. Smock**  
St. Thomas, U.S.V.I.,  
*For defendant Ken Lenois*

**ORDER**

Moore, J.

For the reasons set forth in the memorandum of even date,  
the motion to dismiss Count III (fraud and misrepresentation) of  
the plaintiff's amended complaint is hereby **GRANTED**.

ENTERED this 15th day of December, 2003.

For the Court

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas K. Moore  
District Judge

ATTEST:  
WILFREDO MORALES  
Clerk of the Court

By:\_\_\_\_\_/s/\_\_\_\_\_  
Deputy Clerk

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